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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1407

AIRMAN FIRST CLASS AUGUST DOYLE,

Petitioner,

—v.—

COLONEL HENRY C. KOELBL, Commander, 27th Combat Support Group, and Commander, Cannon Air Force Base; COLONEL STANLEY J. OBARSKI, Commander, 96th Support Group, and Commander, Dyess Air Force Base; and CAPTAIN ALLEN G. ALBERT, Commander, 96th Security Police Squadron,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

PAGE

Citation to Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT

I. This Court should decide whether servicemen are entitled to any constitutional protection with regard to their personal appearance 6

II. This Court should resolve the conflict over the proper scope of federal judicial review of court martial adjudications 10

III. The Court should determine whether *Noyd* v. *Bond* requires military prisoners serving short sentences to exhaust non-judicial military remedies before they can seek federal habeas corpus 12

APPENDIX

Opinion of the United States Court of Appeals, Fifth Circuit 15

Order Denying Petition for Writ of Habeas Corpus 18

Table of Authorities

PAGE

Cases:

Braxton v. Board of Public Instruction, 303 F. Supp. 958 (M.D. Fla. 1969) 8

Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970) 7, 8

Burns v. Wilson, 346 U.S. 137 (1953) 11

Carafas v. LaVallee, 391 U.S. 234 (1968) 6

Crews v. Clones, 432 F.2d 1259 (7th Cir. 1970) 7

Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), aff'd, *per curiam*, 429 F.2d 427 (4th Cir. 1970) 8, 10

Gusik v. Schilder, 340 U.S. 128 (1950) 13

Ho Ah Kow v. Nunan, 12 Fed. Cas. 252 (No. 6,546) (C.C.D. Cal. 1879) 7

Jones v. Mayer Co., 392 U.S. 409 (1968) 7-8

Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir.), *cert. denied*, 396 U.S. 1013 (1969) 9, 11

Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969) 11

Noyd v. Bond, 395 U.S. 683 (1969) 12

Olff v. Eastside Union High School District, 305 F. Supp. 557 (N.D. Cal. 1969) 7

Orloff v. Willoughby, 345 U.S. 83 (1953) 10

PAGE

Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), *cert. dismissed,* 396 U.S. 976 (1969) 10
Richards v. Thurston, 304 F. Supp. 449 (D. Mass., 1969), *aff'd,* 424 F.2d 1281 (1st Cir. 1970) 7, 8

Sibron v. New York, 392 U.S. 40 (1968) 6, 14
Smith v. Resor, 406 F.2d 141 (2d Cir. 1969) 9
Stevenson v. Wheeler County Board of Education, 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd,* 426 F.2d 1154 (5th Cir.), *cert. denied,* 39 U.S.L.W. 3257 (1970) 8
Street v. New York, 394 U.S. 576 (1969) 8

United States v. Snyder, 18 USMCA 480, 40 CMR 192 (1969) 13

Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969) 7

Constitutional Provisions:

United States Constitution
First Amendment 7, 8
Fourteenth Amendment 7

Statutes:

10 U.S.C. §860 (Art. 60) 13
10 U.S.C. §864 (Art. 64) 5
10 U.S.C. §865 (Art. 65) 5
10 U.S.C. §866 (Art. 66) 13
10 U.S.C. §867 (Art. 67) 13
10 U.S.C. §890 (Art. 90) 3, 4
28 U.S.C. §1254(1) 2

PAGE

Other Authorities:

Air Force Manual 35-10 3

Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970) 11

Hart and Wechsler, *The Federal Courts and the Federal System*, 328 (1953) 10

IN THE

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OCTOBER TERM, 1970

No. .....

AIRMAN FIRST CLASS AUGUST DOYLE,

Petitioner,

—v.—

COLONEL HENRY C. KOELBL, Commander, 27th Combat Support Group, and Commander, Cannon Air Force Base; COLONEL STANLEY J. OBARSKI, Commander, 96th Support Group, and Commander, Dyess Air Force Base; and CAPTAIN ALLEN G. ALBERT, Commander, 96th Security Police Squadron,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 30, 1970.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 434 F.2d 1014 and is set forth in the Appendix, *infra*, at pp. 15-17. The memo-

randum of the United States District Court for the Northern District of Texas is unreported; it is set forth in the Appendix, *infra* at pp. 18-19.

Jurisdiction

The judgment of the United States Court of Appeals was entered on November 30, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether the court-martial conviction of a black Airman for refusal to trim his hair was obtained in violation of his rights to freedom of expression and personal liberty and to due process and equal protection of the law.

2. Whether the validity of a court-martial conviction must be tested by the same constitutional standards that are applied to civilian court convictions.

3. Whether a military prisoner seeking to challenge a court-martial conviction must exhaust non-judicial military remedies before he can seek federal habeas corpus relief.

Statement of the Case

Petitioner was an Airman First Class assigned to the 522nd Tactical Fighter Squadron, Cannon Air Force Base, New Mexico. On the morning of October 24, 1969 he was ordered by his acting Squadron Commander to "get a haircut that was closely trimmed and presented an evenly

graduated appearance" (Pet., 1).[1] He was given until noon to comply.

Petitioner wore his hair in a manner commonly referred to as an "Afro" or natural hairstyle (Pet., 1). It is a hairstyle increasingly worn by black Americans to symbolize and communicate a sense of racial pride and identity. It had that meaning for petitioner. Petitioner's hairstyle on October 24 could in no way have been characterized as long or unkempt.[2] Yet in the eyes of petitioner's commander it did not conform to the following provisions of Air Force Manual 35-10:

> 1-12. Dress and Appearance
>
> b. Personal Appearance—Men:
>
> (2) Hair must be neat and closely trimmed. It may be clipped at the edges of the sides and back, but must present an evenly graduated appearance.

For his refusal to get a haircut petitioner was court-martialed by a Special Court martial convened by respondent Colonel Henry C. Koelbl, the base commander (Pet., 1-2). The court-martial commenced on December 8, 1969. Petitioner was tried under Article 90, Uniform Code of Military Justice (10 U.S.C. Sec. 890) for wilful disobedience of a lawful order, despite his contention that the order was unlawful. At the trial, petitioner introduced

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[1] "Pet.," refers to the habeas corpus application with exhibits filed in the District Court and contained in the record filed with this Court.

[2] Photographs taken that very morning depict a neat, short and regular haircut. Those photographs were prosecution exhibits in the Record of Trial and were made available to the court below.

expert testimony demonstrating that wearing an "Afro" has become a direct expression of pride in being a black American. Petitioner himself testified that he wore an "Afro" because:

> . . . it's a symbol of identity, pride and way of communicating with other blacks. . . . You can walk down the street and you wouldn't say a word to a guy and just look at him, you know, and he's saying to you that "I'm black and I'm proud, I'm not trying to process my hair, I'm not ashamed of it," you know, cut it down, "I'm telling you I'm black and I'm proud," and nothing's going to change that. (Record of Trial, p. 147.)

Nevertheless, on December 10, 1969 the military court found petitioner guilty of violating Article 90 and imposed a sentence of three months confinement at hard labor, forfeiture of $60 pay per month for three months and reduction to the rank of Airman Basic (Pet., 1). Following the sentencing, petitioner was immediately incarcerated (Pet., 2).

Thereafter, and with all possible dispatch, petitioner sought relief both through the military hierarchy and from the civilian courts claiming (1) that his conviction was unconstitutional on a variety of grounds and (2) that he was entitled to release from confinement pending administrative review of that conviction. First, petitioner unsuccessfully sought deferment of the service of his sentence in applications made to Colonel Koelbl, to the military judge, and to the Air Force Court of Military Review (Pet., 2-3; Exhibit D, E). On January 8, 1970 that Court denied relief, holding that "the jurisdiction conferred upon

it by Articles 66 and 69, Uniform Code of Military Justice, does not extend to cases tried by special court-martial in which the sentence, as approved, does not include a bad conduct discharge."

On January 14, 1970, petitioner, having been moved to Dyess Air Force Base in Texas to serve his sentence, commenced the instant habeas corpus action in the Northern District of Texas, challenging both the conviction and the confinement. His petition pointed out that he had completely and unsuccessfully exhausted military remedies on the confinement issue (Pet., 2-3). Petitioner further noted that the merits of the conviction were subject to automatic review only by the Convening Authority, Colonel Koelbl (Article 64, UCMJ) and the Supervisory Authority, the Twelfth Air Force (Article 65, UCMJ) both of which would be administrative, *ex parte* and discretionary, and in no sense judicial (Pet., 2-4). Moreover, that administrative process would not be completed prior to February 22, 1970, the date of petitioner's scheduled release from confinement. Because the sentence did not include a bad conduct discharge there was no possibility of ultimate review by either the Court of Military Review or the Court of Military Appeals.

Despite this showing, District Judge Brewster dismissed the petition on the same day it was filed, App., *infra,* pp. 18-19. He held, alternatively, that petitioner had to exhaust military remedies before he could seek relief in a constitutional court and that the federal courts should not interfere with the appearance requirements of members of the armed forces.

While petitioner was noticing and perfecting a timely appeal to the Fifth Circuit, the intra-military administra-

tive review of his conviction was being completed. On February 10, 1970 the petitioner's sentence was approved by the convening authority and formally ordered to be executed. Petitioner of course had almost completed serving it by that time. In late February the conviction was approved by the Supervisory Authority. On March 9 an application was made to the Air Force Judge Advocate General; it was denied two months later, on May 14, 1970.

Thereafter, the court below affirmed the denial of habeas corpus relief, holding with the District Court that petitioner was properly required to exhaust military remedies and, on the merits, that the regulation and order were valid, App., *infra,* pp. 15-17. It is to review this judgment that petitioner seeks a writ of certiorari.[3]

REASONS FOR GRANTING THE WRIT

I.

This Court should decide whether servicemen are entitled to any constitutional protection with regard to their personal appearance.

While it may appear that the federal courts have only recently been called upon to determine whether individuals have a constitutional right to be free from state interference with personal appearance, Justice Field, almost a century ago held unconstitutional a haircut regulation that required all prisoners to have their hair cut within

[3] In July, 1970 petitioner was discharged from the Air Force, with a general discharge under honorable conditions. This does not moot the issues tendered in this certiorari petition. See *Sibron* v. *New York,* 392 U.S. 40 (1968); *Carafas* v. *LaVallee,* 391 U.S. 234 (1968).

one inch of their scalp, thus removing the queues of Chinese inmates,

> The cutting off the hair of every male person within an inch of his scalp, on his arrival at the jail, was not intended and cannot be maintained as a measure of discipline. . . . The act by itself has no tendency to promote discipline. . . . *Ho Ah Kow* v. *Nunan,* 12 Fed. Cas. 252, 254 (No. 6,546) (C.C.D. Cal. 1879).

More recently the issue has primarily been raised in the public school context, and the preponderance of authority has afforded constitutional protection for the individual to wear his hair as he sees fit, not as an official of the state shall dictate. See, *e.g., Breen* v. *Kahl,* 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); *Richards* v. *Thurston,* 424 F.2d 1281 (1st Cir. 1970); *Crews* v. *Cloncs,* 432 F.2d 1259 (7th Cir. 1970).

Some courts have found that the individual's choice of hair style is a legitimate mode of expression protected by the First Amendment. *E.g., Westley* v. *Rossi,* 305 F. Supp. 706 (D. Minn. 1969); *Olff* v. *Eastside Union High School District,* 305 F. Supp. 557 (N.D. Cal. 1969); *Richards* v. *Thurston,* 304 F. Supp. 449 (D. Mass., 1969), *aff'd,* 424 F.2d 1281 (1st Cir. 1970). Affording constitutional protection to a hair style is particularly appropriate where it is not merely a symbol of a generalized nonconformity, but is a specific expression of petitioner's pride in his heritage as a black American. Such communication is entitled to even greater protection than other forms of symbolic speech because it not only draws upon the safeguards of the First Amendment, but is informed by the historical purposes of the Fourteenth Amendment as well. See *Jones* v.

Mayer Co., 392 U.S. 409 (1968); *Street* v. *New York*, 394 U.S. 576 (1969); *Braxton* v. *Board of Public Instruction*, 303 F. Supp. 958 (M.D. Fla. 1969) (upholding the right of a black school teacher to wear a goatee as an expression of racial pride); *but see, Stevenson* v. *Wheeler County Board of Education*, 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir.), *cert. den.*, 39 U.S.L.W. 3257 (1970).

These decisions demonstrate that in other disciplinary contexts, the right to have a particular hairstyle has been recognized as a protected mode of expression. Soldiers, of course, are protected by the First Amendment. See, *e.g.*, *Dash* v. *Commanding General*, 307 F. Supp. 849 (D.S.C. 1969), *aff'd, per curiam*, 429 F.2d 427 (4th Cir. 1970), *cert. filed*, 39 U.S.L.W. 3287 (1/5/71). And they are entitled to a resolution of their similar claims to freedom of expression.

While some courts have assimilated a choice of hairstyle to the First Amendment, other courts have articulated a right of personal liberty, anchored in the due process clause but nurtured by other constitutional provisions. The leading decisions are *Breen* v. *Kahl, supra*, and *Richards* v. *Thurston, supra*, where the First Circuit concluded that "within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes," 424 F.2d at 1285.

However the right is characterized, the courts have identified it as a fundamental liberty and, accordingly, have demanded specific articulation of legitimate and compelling interests which justify infringement of those liberties. It is significant that almost all of the decisions have been rendered on behalf of public school students. In impor-

tant respects, schools, like the armed forces, are institutions which claim to require the systematic imposition of discipline. Yet courts have refused to allow infringement of personal rights to be based on the generalized claim of a need for discipline.

Throughout the proceedings in this case, military and civil, no substantial justification—apart from a generalized assertion of the need for discipline—was offered to demonstrate what military interests were furthered by abridging petitioner's choice of hairstyle. Petitioner's hair could not cause a disturbance, interfere with the proper wearing of headgear, or infringe any legitimate military objective. Petitioner did not claim the right to wear excessively long hair or a bizarre or unique hairstyle. In civilian life, he could in no way have been penalized for his appearance. He certainly could not have been subjected to a valid criminal prosecution. The issue is whether a different result is constitutionally allowable because petitioner was an airman at Cannon Air Force Base. See *Kauffman* v. *Secretary of the Air Force,* 415 F.2d 991 (D.C. Cir.) *cert. denied,* 396 U.S. 1013 (1969).

One Circuit Judge has noted that the length of a soldier's hair has been a troublesome issue since the days of Samson. *Smith* v. *Resor,* 406 F.2d 141, 143 (2d Cir. 1969). The antiquity of the problem does not obviate the need for its resolution. Petitioner has been subjected to criminal prosecution and penal confinement because of his hair style. Other servicemen are facing the same deprivations. The writ should be granted to resolve these issues.

II.

This Court should resolve the conflict over the proper scope of federal judicial review of court martial adjudications.

The District Court ruled that the federal courts "should not interfere with disciplinary matters of the armed forces in regard to appearance of its members," App., *infra*, pp. 18-19. The Fifth Circuit affirmed, tersely holding that "the regulation involved pursuant to which the order of the commanding officer was given is valid." App., *infra*, p. 17. Both rulings embody the concept that certain kinds of military determinations are unreviewable by federal courts, or are reviewable by some watered-down constitutional standard.

Increasingly, federal courts are being called upon to determine the constitutionality of court-martial adjudications. Some courts such as the one below have misapplied the "specialized community" dictum of *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953) and refused to question the military determination. E.g., *Raderman* v. *Kaine*, 411 F.2d 1102 (2d Cir.), *cert. dismissed*, 396 U.S. 976 (1969). Other courts have demonstrated a willingness to consider constitutional claims, including First Amendment submissions. E.g., *Dash* v. *Commanding General*, *supra*. A "hands off" approach is particularly inappropriate when the relief sought is habeas corpus on behalf of one detained pursuant to a court-martial conviction. See Hart and Wechsler, *The Federal Courts and the Federal System*, 328-29, 1338-39 (1953). As District Judge Pettine noted,

> The federal district courts are the front lines of constitutional litigation, more suited to decision-making in the constitutional area than any of the various federal agencies or the military tribunals. *Moylan* v. *Laird*, 305 F. Supp. 551, 554 (D.R.I. 1969).

There is also a conflict among federal courts as to the proper standards to be applied in reviewing a court-martial conviction and the interpretation to be given this Court's decision is *Burns* v. *Wilson*, 346 U.S. 137 (1953). *Burns* has frequently been interpreted to require a narrow scope of review. But this view has been severely criticized, and it has been suggested that there are no sound constitutional or policy reasons which require a narrower scope of review of court-martial convictions than of state or federal court convictions; if anything, the decisions of military tribunals should be subjected to greater scrutiny not less. See, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1217-25 (1970). Indeed, one Circuit has squarely held that military rulings on constitutional issues must conform to this Court's standards, unless military necessity is shown to require a different rule:

> We think the scope of review of military judgments should be the same as that in habeas corpus review of state or federal convictions, and constitutional requirements should be qualified by the special conditions of the military only where these are shown to require a different Rule." *Kauffman* v. *Secretary of the Air Force*, *supra*, at 992.

Had this type of review been afforded to petitioner, his conviction would not have been upheld. See Point I, *supra*.

As more and more servicemen seek to challenge their convictions, these issues of when and how such convictions are to be reviewed by the federal courts take on greater urgency and require resolution by this Court.

III.

The Court should determine whether *Noyd* v. *Bond* requires military prisoners serving short sentences to exhaust non-judicial military remedies before they can seek federal habeas corpus.

The courts below held that the writ should not be issued while military remedies were pending. The petitioner argued that when he filed his petition, he had no *judicial* remedies available within the military and that the administrative remedies did not have to be exhausted as a prerequisite to federal relief.

In *Noyd* v. *Bond,* 395 U.S. 683 (1969), this Court held that a military petitioner had to utilize remedies within the "military court system" before he could seek federal relief. There the petitioner had not applied to the Court of Military Appeals, which he could have done. This Court noted that "[a] different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes," 395 U.S. at 695, n. 7.

This case presents precisely that question. Because the sentence did not include a bad conduct discharge or confinement for one year or more, neither the Air Force Court of Military Review nor the United States Court of Military Appeals would have had jurisdiction to review the con-

viction. Articles 66, 67 UCMJ (10 U.S.C. Secs. 866, 867); *United States* v. *Snyder,* 18 USMCA 480, 40 CMR 192 (1969). When petitioner filed his application, the only arguably substantial remedy was a discretionary petition to the Judge Advocate General under Article 60. A similar procedure was required to be exhausted in *Gusik* v. *Schilder,* 340 U.S. 128 (1950), where this Court met the "suspension" argument by noting that if the administrative remedy proved unavailing, ". . . no rights will have been sacrificed. Habeas corpus will then be available. . . ." 340 U.S. 133. The writ was not being suspended, merely deferred. The Court could confidently make such a prediction because Gusik was serving a life sentence. Here, however, the petitioner completely served his sentence months before the administrative review was complete.

If exhaustion of administrative remedies is required in cases such as this, two factors will combine to deny these petitioners access to anything resembling a constitutional court to challenge their imprisonment. First, because the sentence is less than a year, there is no appellate review in the Court of Military Appeals. Similarly, these short sentences will have been completely served before administrative remedies can be exhausted, and habeas corpus relief will then be unavailable.

The result is that an entire area of low-visibility, misdemeanor-type court martial convictions will be completely insulated from judicial review. Yet this type of criminal adjudication, be it military or civil, must be subjected to greater judicial scrutiny, not less. As this Court has noted, "[m]any deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process—in the context of prosecutions for

'minor' offenses which carry short sentences." *Sibron* v. *New York,* 392 U.S. 40, 52 (1968).

If the exhaustion rule embodied below is allowed to stand, countless servicemen will continue to be subjected to unconstitutional convictions and confinements imposed by special court martial tribunals without any opportunity for federal habeas corpus relief. Such a result is neither required nor tolerable.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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February 1971

APPENDIX

Opinion of the United States Court of Appeals, Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29726

AIRMAN FIRST CLASS AUGUST DOYLE,

Petitioner-Appellant,

—v.—

COL. HENRY C. KOELBL, Commander, 27th Combat Support Group, & Commander, Cannon Air Force Base; COL. STANLEY J. OBARSKI, Commander, 96th Support Group, & Commander, Dyess Air Force Base; and CAPTAIN ALLEN G. ALBERT, Commander, 96th Security Police Squadron,

Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(November 30, 1970)

Before:

JONES, GEWIN and CLARK,

Circuit Judges.

PER CURIAM: Appellant Doyle, a voluntary enlisted member of the United States Air Force, complains of the

refusal of the district court to grant his petition for habeas corpus relief wherein he attacks his special court-martial conviction for refusing to obey a direct order of his superior commissioned commanding officer. We affirm.

Doyle, an airman first class, was serving on active duty during 1969 and was assigned to the 522nd Tactical Fighter Squadron, Cannon Air Force Base, New Mexico. At a meeting of military personnel on October 23, 1969 at which Doyle was present, he and others were advised by the squadron commander of the importance of proper appearance and of the requirements of the Air Force Manual with respect to haircuts. After this meeting Doyle and two others discussed the haircut regulation with the commanding officer. On the following day the commanding officer issued a direct order to Doyle to cut his hair in accordance with regulations. He replied to his military commanding officer "You might as well take me back to jail because I am not going to get a haircut."

Before military review procedures were completed, Doyle petitioned the United States District Courts for the District of New Mexico and the Northern District of Texas for habeas corpus. Both courts denied relief and this appeal is from the order denying his petition in the Northern District of Texas. The district court concluded:

1. Such writ should not be issued pending the appeal from the findings and sentence of the court-martial.

2. The Court should not interfere with disciplinary matters of the armed forces in regard to appearance of its members.

It is our conclusion that the district court did not abuse its discretion in refusing to take jurisdiction of the case.

Moreover, it is our opinion that the regulation involved pursuant to which the order of the commanding officer was given is valid. *Noyd* v. *Bond,* 395 U.S. 683 (1969); *United States* v. *O'Brien,* 391 U.S. 367 (1968), reh. den., 393 U.S. 900; *Orloff* v. *Willoughby,* 345 U.S. 83 (1953); *Nixon* v. *Secretary of Navy,* 422 F.2d 934 (2d Cir. 1970); *Raderman* v. *Kaine,* 411 F.2d 1102 (2d Cir. 1969); *Gallagher* v. *Quinn,* 363 F.2d 301 (D.C. Cir.), cert. den. 384 U.S. 881 (1966); *Tuggle* v. *Brown,* 362 F.2d 801 (5th Cir. 1966); *McCurdy* v. *Zuckert,* 359 F.2d 491 (5th Cir.), cert. den. 385 U.S. 903 (1966).

Judgment AFFIRMED.

Order Denying Petition for Writ of Habeas Corpus

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION
CA 1-446

AIRMAN 1ST CLASS AUGUST DOYLE

vs.

COLONEL HENRY C. KOELBL, *et al.*

The petitioner, August Doyle, alleges he is an airman 1st Class, 522d Tactical Fighter Squadron, and that he has been found guilty by Court Martial on December 10, 1969, of violating a lawful order of a superior commissioned officer. He says that the order that he "get a haircut that was closely trimmed and presented an evenly graduated appearance", and that he refused to obey the order on the ground that it violated his constitutional rights. Review of the Findings and Sentence of the Court Martial is pending.

The Court is of the opinion that the writ of habeas corpus should not be granted for two reasons:

1. Such a writ should not be issued pending the appeal from the Findings and Sentence of the Court Martial.

2. The Court should not interfere with disciplinary matters of the armed forces in regard to appearance of its

members. If a member of the armed forces can complain about the regulations as to haircuts, he could just as legitimately complain about being required to wear a certain type of uniform.

It is therefore ordered that the petition for writ of habeas corpus be and it is hereby denied.

Signed this 14th day of January, 1970.

/s/ Leo Brewster
Judge

BRIEF FOR THE RESPONDENTS IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1407

AIRMAN FIRST CLASS AUGUST DOYLE, PETITIONER

v.

COLONEL HENRY C. KOELBL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–17) is reported at 434 F. 2d 1014. The opinion of the district court (Pet. App. 18–19) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1970. On March 1, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

420-896—71

QUESTION PRESENTED

Whether the courts below properly denied petitioner relief on his habeas corpus petition, filed before his military review remedies had been exhausted, attacking a court-martial conviction for refusal to obey his superior officer's direct order to trim his hair in accord with Air Force regulations.

STATEMENT

Petitioner, an Airman First Class on active duty in the United States Air Force, was convicted by a special court-martial of willfully disobeying a direct order of his superior officer, in violation of Article 90, U.C.M.J., 10 U.S.C. 890. The order in question, by petitioner's Acting Squadron Commander, directed petitioner to cut his hair so that it would be evenly graduated, in compliance with Air Force Manual 35–10.[1] Petitioner replied: "You might as well take me back to jail because I am not going to get a haircut" (Pet. App. 16).

Petitioner was convicted by the court-martial on December 10, 1969. The present habeas corpus action was commenced in the District Court for the Northern

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[1] Air Force Manual 35–10, paragraph 1–12b(2), provides in pertinent part that:

> "Hair must be neat and closely trimmed. It may be clipped at the edge of the sides and back, but it must present an evenly graduated appearance."

Paragraph 1–4c of the Manual provides in part that:

> "Each commander will insure that personnel under his command individually and collectively present a well-groomed appearance that reflects credit on the Air Force and that they comply with the provisions of this manual."

District of Texas[2] on January 14, 1970, at a time when none of the various procedures within the military judicial system for review of a conviction such as petitioner's had been completed. The district court denied the petition on the alternative grounds that (1) the writ was not available pending exhaustion of petitioner's military review remedies and (2) in any event, there was no substance to petitioner's sole argument on the merits—that the Air Force regulations as to haircuts violated his First and Fifth Amendment rights (Pet. App. 18–19). The court of appeals affirmed each of these alternative grounds for the decision (Pet. App. 15–17).

After the district court had acted upon the habeas corpus petition, petitioner for the first time took steps seeking reversal of his conviction by the military authorities pursuant to the Uniform Code of Military Justice (U.C.M.J.).[3] On January 28, 1970, he sub-

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[2] An earlier petition for habeas corpus had been filed in the United States District Court for the District of New Mexico. *Doyle* v. *Koelbl*, No. 8340. On January 14, 1970, that court dismissed for lack of jurisdiction, and its decision was not appealed. The present proceeding was initiated following petitioner's transfer from New Mexico to Dyess Air Force Base in Texas (Pet. 5).

Petitioner had earlier sought, without success, to have his confinement stayed by the military pending review of the conviction. See Pet. 4–5.

[3] Petitioner's conviction was subject to review within the military framework by at least three different authorities. Under Article 60, U.C.M.J., 10 U.S.C. 860, the findings and sentence of the court-martial are reviewable by "the person who convened the court." Article 64, U.C.M.J., 10 U.S.C. 864, provides that "the convening authority may approve only such findings of guilty, and the sentence * * * as he finds correct in law and

mitted to the convening authority an "Assignment of Errors"; that authority approved the conviction and sentence on February 10, 1970, and the supervisory authority approved them shortly thereafter (Pet. 6). Petitioner applied to the Air Force Judge Advocate General for relief on March 9, 1970, and this was denied on May 14 (*id.*). Meanwhile petitioner had completed his sentence in February 1970, and in July 1970 he was discharged from the Air Force with a general discharge under honorable conditions (Pet. 5, 6, n. 3).

ARGUMENT

1. Petitioner does not contest the well-established principle, *e.g., Noyd* v. *Bond,* 395 U.S. 683, that the

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fact and as he in his discretion determines should be approved. * * *" A second review is available from the officer exercising general court-martial jurisdiction—the "supervisory authority." *Manual for Courts-Martial United States* 1969 (rev. ed.) para. 91b(2) (hereafter MCM). The supervisory authority may "take any action with respect to such findings and sentence as may be taken by the convening authority in the latter's initial action on the record * * *." MCM para. 94a(2).

Since petitioner's conviction was imposed by a special court-martial and did not involve a bad-conduct discharge, it was not subject to review by either the Court of Military Review or by the Court of Military Appeals. Article 65, U.C.M.J., 10 U.S.C. 865). However, review by the Judge Advocate General is available in any such case where "the findings or sentence, or both, in a court-martial case * * * has not been reviewed by a Court of Military Review * * *." Article 69, U.C.M.J., 10 U.S.C. 869. On this review the Judge Advocate General is empowered to vacate or modify the findings or sentence if he concludes there has been "error prejudicial to the substantial rights of the accused." See S. Rep. No. 1601, 90th Cong., 2d Sess., p. 15.

With respect to the further review available to petitioner before the Air Force Board for the Correction of Military Records, see p. 5, *infra.*

military procedures for review of a court-martial conviction must be exhausted before that conviction can be attacked in a civil court by petition for a writ of habeas corpus. He seeks, however, to avoid that fundamental principle by arguing that there should be no such requirement when, as here, the nature of the conviction permits only "administrative" military review and not "judicial" military review by the Court of Military Review and the Court of Military Appeals. Such a distinction is meaningless. Both the convening and supervisory authorities, with the advice of their staff judge advocates, approve convictions only to the extent that they find them "correct in law and fact"; they commonly set convictions aside and have full authority to consider claims of the nature of petitioner's constitutional objection to the order he was convicted for disobeying. The Judge Advocate General has a similar authority to consider such legal issues in a case such as petitioner's and may set aide the conviction if he finds error. Thus, there is no basis for petitioner's attempt to bypass these avenues of meaningful review. See *Beard* v. *Stahr,* 370 U.S. 41; *Gusik* v. *Schilder,* 340 U.S. 128.

Petitioner suggests that a short-term sentence such as his may be completed and the matter mooted by the time his military remedies are exhausted. But petitioner continues to have an administrative remedy before the Air Force Board for the Correction of Military Records, to which he can apply for further review of his conviction without regard to the completion of his sentence and his discharge from the Air Force. 10 U.S.C.

1552; 32 C.F.R. 865. And if he is dissatisfied with the action of that Board, he may bring a civil action in the Federal courts seeking judicial review. See *Harmon* v. *Brucker*, 355 U.S. 579.

Accordingly, we submit that the district court properly declined to entertain the petition for a writ of habeas corpus.[4]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1971.

[4] The courts below held that the regulation which petitioner here challenges (n. 1, *supra*) is valid and concluded that civilian courts should not interfere "with disciplinary matters of the armed forces in regard to appearance of its members" (Pet. App. 16, 18–19). Petitioner's principal arguments (Pet. 6–12) are addressed to this holding. It is unnecessary to deal with these arguments in view of petitioner's failure to exhaust his military remedies before presenting this question to the courts below. We would submit, however, that the federal courts should not assume the task of reviewing the military's determinations as to what constitutes the neat appearance required of servicemen (see *Orloff* v. *Willoughby*, 345 U.S. 83; *Granzella* v. *Whyte*, No. 470, this Term, certiorari denied, December 7, 1970); this regulation imposes no unconstitutional restriction on petitioner's right of free expression (see *Dash* v. *The Commanding General, Fort Jackson, South Carolina*, No. 1168, this Term, certiorari denied, March 22, 1971.)

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